United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Docket No. 77-1454

77-1454

B P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

CHARLES WILLIAMS, ROBERT MC CRAY,

Appellants

BRIEF FOR APPELLANT CHARLES WILLIAMS

Appeal From a Judgment Of
Conviction in The United
States District Court For
The Eastern District of
New York

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UNITED STATES COURT OF APPEALS
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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
ARGUMENT	7
POINT I - THE DISTRICT COURT ERRED IN NOT SAFEGUARDING THE JURY'S CONSIDERATION OF THE MILWAUKEE ROBBERY WITH THE LIMITATIONS OF F.R.EVID. 404(b)	8
POINT II- THE DISTRICT COURT ERRED IN IMPLYING IN ITS CHARGE THAT THE REASONABLE DOUBT STANDARD DID NOT APPLY TO KING'S TESTIMONY . . .	13
POINT III-THE DISTRICT COURT ERRED IN DENYING THE RULE 17(b) APPLICATION AND IN CONVEYING ITS VIEW THAT SCOTT WAS NOT TO BE BELIEVED	14
A. Disregard of this Circuit's Durant Opinion	14
B. Discrediting Scott	16
POINT IV- THE DISTRICT COURT COMMITTED OTHER ERRORS WHICH PREJUDICED WILLIAMS AND REQUIRE A NEW TRIAL	17
CONCLUSION	19

TABLE OF AUTHORITIES

Cases

	Page
Brady v. Maryland, 373 U.S. 83 (1963)	17, 18
Bruton v. United States, 391 U.S. 123 (1968)	9
Cool v. United States, 409 U.S. 100 (1972)	13
Prince v. United States, 352 U.S. 322 (1957)	18
United States v. Ash, 413 U.S. 300 (1973)	17
United States v. Bell, No. 77-1407	1
United States v. Cooper, No. 77-1327, 2d Cir. December 19, 1977	9, 12
United States v. D'Anna, 450 F.2d 1201 (2d Cir. 1971)	16
United States v. DiGiovanni, 76-1097, 2d Cir.	18
United States v. Durant, 545 F.2d 823 (2dCir. 1976)	3, 15
United States v. Finkelstein, 526 F.2d 517 (2d Cir. 1975)	11
United States v. Gerry, 515 F.2d 130 (2d Cir. 1975)	9
United States v. Grunberger, 431 F.2d 1062 (2d Cir. 1970)	16
United States v. Jacobs, 547 F.2d 772 (2d Cir. 1976)	10
United States v. Klein,340 F.2d 547 (2d Cir. 1965)	9
United States v. Myers, 550 F.2d 1036 (5th Cir. 1977)	19

TABLE OF AUTHORITIES (CONTD.)

Cases (Contd)

	Page
United States v. Miley, 513 F.2d 1101 (2d Cir. 1974)	11
United States v. Nazzaro, 422 F.2d 302 (2d Cir. 1973)	16
United States v. Papadakis, 510 F.2d 237 (2d Cir. 1975)	8, 9, 12
United States v. Pravato, 505 F.2d 703 (2dCir. 1974)	18
United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974)	11
United States v. Stugla, 531 F.2d 1377 (6th Cir. 1976)	13
United States v. Tolliver, 2d Cir., January 3, 1978	17
United States v. Torres, 519 F.2d 723 (2d Cir. 1975)	8
United States v. Tsanas, 2d Cir., January 13, 1978	13
United States v. Wade, 388 U.S. 218 (1967)	17
United States v. Wiley, 278 F.2d 500 (7th Cir. 1960)	19

Other

18 U.S.C. 371	1
18 U.S C. 2113(a), (d)	1, 17
F.R.Crim.P. 17(b)	2, 6, 14, 15
F.R.Evid. 106	18
F.R.Evid. 403	18
F.R.Evid. 404(b)	2, 8
F.R.Evid. 801	18

TABLE OF AUTHORITIES

Other (Contd.)

	Page
Devitt & Blackmar, Federal Jury Practice and Instructions, Sec. 17.05 (3d Ed.)	13
Rubin, From Disparity and Equality of Sentences -- A Constitutional Challenge, 40 F.R.D. 55	19

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UNITED STATES OF AMERICA,

Appellee,

-against- Docket No. 77-1454

CHARLES WILLIAMS, ROBERT McCRAY,

Appellants.

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BRIEF FOR APPELLANT CHARLES WILLIAMS

Charles Williams appeals from his September 15, 1977 conviction in the United States District Court for the Eastern District of New York (Bramwell, J.), upon a jury finding that he robbed two Long Island banks and conspired to rob those banks and another in Milwaukee. 18 U.S.C. 2113a,d, 371. His sentence was forty-five years (A3)*. Another defendant, Robert McCray, was convicted with him, sentenced to forty years, and is a co-party to this appeal. Williams' counsel is assigned under the C.J.A.

The same indictment was before this Court in United States v. Bell, No. 77-1407, the appeal of a co-defendant who was jointly indicted but separately tried. Bell's issues related solely to the Government's case against him. Nothing therefore

* Numbered references without more are to the trial transcript. "A" denotes the Appendix to this Brief.

in this Court's January 3, 1978 bench affirmance bears on this appeal.

Because there were no bank pictures or identification, the Government's case rested solely on the credibility of defendants' alleged accomplice who, as is typical in such cases, was more reprehensible then they. Significant to the jury's assessment of that was the Milwaukee robbery which dominated the trial, which in reality was a similar act, but which was not presented as such because it was part of the purported conspiracy.

QUESTIONS PRESENTED

The broad issue this Court will have to decide is whether the several actions of the district court challenged on this appeal deprived Williams of the proper framework for the jury to assess the accomplice's credibility. The particular questions within that are as follows:

1. Whether the district court erred in not safeguarding the jury's consideration of the Milwaukee robbery with the limitations set forth in F.R.Evid. 404(b).

2. Whether the district court erred in implying in its charge that the reasonable doubt standard did not apply to the accomplice testimony because there was corroboration.

3. Whether the district court erred in denying a F.R.Crim.P. 17(b) application to have a necessary witness

brought to trial at Government expense (see United States v. Durant, 545 F.2d 823 (2d Cir. 1976)) and in conveying its view to the jury that another defense witness was not to be believed.

4. Whether the district court erred in other of its rulings, including on an in court identification, and on a Government request to introduce FBI reports as prior consistent statements after cross-examination of the accomplice witness.

STATEMENT OF THE CASE

On February 9, 1976 the European American Bank, Westbury, New York was robbed by several armed men of $23,350 (575-80, 597). They wore ski masks (587) so they could not be photographed or identified. Three months later (May 6, 1976) the Nassau Savings and Loan Association, Rockville Centre, New York lost $24,053 in another armed robbery (608). Again the robbers wore ski masks (610).

The Government made no progress in solving those robberies until November 1976 when it arrested Curtis King in Monticello, New York for another bank robbery (116). Faced with a possible sentence of twenty-five years and more (122), King then brought the Westbury and Rockville Centre robberies as well as another in Milwaukee in March 1976, to the Government's attention and implicated Williams, McCray, Bell, Gary Graham and Robert Hairston in return for limited exposure on those robberies (124) and a concurrent sentence treatment for the

Monticello offense (126). The Government then obtained Indictment 76 CR 157 against all six. Count One charged a conspiracy between January and May 1976 "to rob, by force, violence and intimidation, a series of banks within the Eastern District of New York and elsewhere," naming among the overt acts the two Long Island and the Milwaukee robberies (A9); Counts Two and Three, the Westbury robbery (A10-11), first under Sec. 2113(a), then under Sec. 2113(d); and Counts Four and Five that in Rockville Centre against Williams, King and McCray (A11-12).

Bell and Graham were severed, tried before Judge Mishler and convicted. Hairston pleaded guilty.* Williams and McCray were tried before Judge Bramwell in a ten day trial commencing the end of June, 1977. King was the Government's main witness. In addition to the two Long Island robberies (59-67, 104-10), he told of being summoned by Williams and McCray to Chicago for what eventually became the Milwaukee robbery and of the details of that robbery (80-95). The remainder of the Government's case was circumstantial evidence allegedly corroborating King. Although some concerned Westbury and Rockville Centre (575, 585, 594, 607, 636, 643, 662), by far the vast bulk of the Government's case was on the March 11 Milwaukee robbery and the Government's theory that Williams and

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*Bell received fifteen years, Hairston five, and Graham probation.

McCray started in Atlanta with a rented car, went to Detroit, then to Chicago where King was summoned, then to Milwaukee to rob the bank, and back to Atlanta. This consisted of testimony of a Michigan State Trooper to his arrest of McCray and Williams on March 5, 1976 for drunk driving in a Mercury with Georgia plates (432-33); of the Milwaukee bank vice president and cashier to the robbery itself (461-64, 472-78); of a Georgia rental agent to rental of the Mercury in Georgia on February 18 and return on March 15 (483); of a Milwaukee housewife to a pre-robbery car switch (508-11); of another Milwaukee resident to another car switch (526-28); of a Chicago hotel manager to conversations on March 7 with two men with the aliases of Williams and McCray (534-45); of a Detroit hotel employee to records showing Williams' alleged stay there from February 29 to March 3 (687); of a Detroit Airport car rental agent to a car missing on March 5 (703); of a Milwaukee detective to finding a car used in the robbery with tickets from Chicago (729-30), the car coming from the Detroit Airport rental agency (745); of an Atlanta car dealer to Williams' alleged purchase of a Lincoln with a $5,000 down payment on March 12 (761); and of a stipulation that Williams was driving the Lincoln in Queens on May 21, 1976 (829). The Milwaukee robbery indeed occupied one-half of the Assistant's summation (939-963), with no suggestion then or at any point before, that it was anything but a charge in the indictment, on a par with the two Long Island robberies.

Defendants presented three witnesses. One, an employee at the Westbury bank, said she thought the faces under the ski masks were probably white not black (865). Another, Alvin Scott, said King told him in the MCC that he was cooperating with the Government and needed people to implicate. When King said that McCray ran around with his wife and that Williams had a run-in with his son (879-82), Scott suggested that King implicate them, and he did, albeit falsely (882-84). The final defense witness was Williams' mother. McCray had wanted to bring in another witness at Government expense, F.R.Crim.P. 17(b), but the court denied the application.

After deliberating more than two days (J 30-54) and asking that all of Scott's testimony be re-read (1139) as well as testimony from some of the Milwaukee witnesses (1139, 1143)* the jury returned a guilty verdict on all counts. The court sentenced Williams to five years on the conspiracy count, twenty on the Westbury counts, and twenty-five on the Rockville Centre counts. The substantive count sentences were consecutive, and the conspiracy sentence concurrent.

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* The district court repeatedly charged the significance of the Milwaukee robbery as an overt act in the indictment. It added, however, a single short charge paragraph that the robbery could be considered as a similar act as well (A75-76).

ARGUMENT

The two Long Island robberies were neither special nor unique. In themselves, therefore, they furnished little to aid the Government's proof since the robbers were masked. The crucial trial issue was whether the jury would put King's testimony together with the Milwaukee jaunt,* and credit that testimony over Scott's statement that King was unjustly implicating Williams and McCray.

We are quite aware that Williams' record was less than exemplary, that he allegedly committed a serious federal crime, and that the Government's case was thorough and well presented. Nonetheless King, on whom the Government ultimately stood or fell, was hardly exemplary himself,** and juries

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* The district court so noted (721): case will be decided by whether "King's statements as to his involvement and the involvement of others in the matters before this jury are corroborated by the strangers and the independent witnesses", basically on the Milwaukee episode.

** King started his vicious crimes at about twelve, and over the next years moved steadily from juvenile institutions to Elmira to Auburn (34-35). His convictions included larcenies, robberies, auto theft, weapons possessions and bank robberies (34-37), his crimes usually involved weapons and violence (132-33, 169-71) and on the Monticello robbery he attempted to run over a policeman (374). Once, suspecting co-defendant Bell of an affair with his wife, he had them both strip, stabbed his wife, and would have done the same to Bell except he jumped through a fifth floor window (158-59). His responses on cross-examination demonstrated his willingness to perjure himself to sustain his testimony. He stated, for example, that a police officer "pushed me out of the car" (176) when questioned about an attempted escape; that an attempted robbery of a restaurant was to get something to eat there (137-38); that he was not a drug dealer (147) although he was making $400-$500 a week selling cocaine (149-50); that he was a "peaceful" man in spite of his repeated violent acts (321); and that over a period of several weeks' cooperation he told the agents nothing about the Milwaukee robbery because he had "forgotten" about it (270-71).

have on more than one occasion acquitted when the Government could do no better than the likes of him. Given that, defendants' problems below were real but not insurmountable, and they were entitled to fair treatment from the district court which would have given them the opportunity, which indeed existed, to prevail.

The trial court, we submit, failed to do that with respect to each of the crucial elements in the jury's deliberations. It totally mishandled the Milwaukee proof; its accomplice charge on King, probably the most important feature of its charge, was improper; and it destroyed the defense attempt, through Scott and otherwise, to discredit King.

POINT I

THE DISTRICT COURT ERRED IN NOT SAFEGUARDING THE JURY'S CONSIDERATION OF THE MILWAUKEE ROBBERY WITH THE LIMITATIONS OF F.R.EVID. 404(b).

This Court generally permits the Government to introduce similar act evidence. F.R.Evid. 404(b); United States v. Papadakis, 510 F.2d 287 (2d Cir. 1975); United States v. Torres, 519 F.2d 723 (2d Cir. 1975). It has recognized, however, the subleties between use for bad character and use for more limited permissible purposes, the possibilities for confusion

error by the jury, compare Bruton v. United States, 391 U.S. 123 (1968), and has insisted accordingly that the district court funish clear guidance to the jury on the limited purposes for which the evidence can be considered. United States v. Papadakis, 510 F.2d at 295; United States v. Klein, 340 F.2d 547, 549 (2d Cir. 1965); United States v. Gerry, 515 F.2d 130, 141 (2d Cir. 1975); United States v. Cooper, No. 77-1327, 2d Cir. December 19, 1977.

We submit that in substance, if not in form, the Milwaukee robbery was a similar act; that the jury was never given to understand that or the limited purposes to which evidence of that robbery could be put; and that this error was fundamental, pervaded the trial, and mandates reversal.

* * *

The district court proceeded throughout on the assumption that the Government was entitled to have the Milwaukee robbery before the jury without limitation because it was charged in the indictment as an overt act on the continuing conspiracy (A83-84). That, we submit, was wrong.

First, the aggregate possible sentence for the Long Island robberies was fifty years. That for the conspiracy, including all three robberies, was five. The Government hardly needed the conspiracy, therefore, to augment defendants' sentence exposure. Indeed, on Williams' final sentence the

five year conspiracy term was concurrent to the forty five year aggregate on the substantive counts. See United States v. Jacobs, 547 F.2d 772, 775 & n. 6 (2d Cir. 1976) (perjury count added "as a strategic ploy [to]. . . make conviction on the substantive counts easier"; perjury sentence realistically added nothing to sentencing possibilities).

Second, the Government did not need the Milwaukee robbery as an overt act. Anything in furtherance of the conspiracy would do. Compare A 10 (meeting was first overt act) with A 50 (charge: overt act can be innocent in itself).

Third, proof of the continuing conspiracy was shallow, possibly non-existent. Only King could support the theory. Although he testified that he was recruited by Williams and McCray and had bank robbery discussions with them (49-55), it is far from clear that these were general discussions, rather than specifically about the Westbury robbery which occured soon thereafter (55); and whether general or specific, King attributed no statements either to Williams or McCray that there was to be anything beyond that robbery. While this alone was enough to kill the continuing conspiracy notion, that certainly should have happened when King stated on cross-examination that he was "through", "finished" (310) after the Westbury robbery; that his association with Williams and McCray broke up with no discussions for or contemplation of another robbery; and that the

Milwaukee robbery was planned as a fresh venture (312). Thus, long before the Milwaukee proof came in to corroborate (King was the Government's first witness), the district court knew or should have known that the Government would have problems on the "continuing conspiracy", and that the justification for the Milwaukee robbery as an overt act on such a conspiracy was wrong for this reason as well.*

If we are right that the similar act substance of the Milwaukee proof, rather than the overt act form controls, there must be a reversal. The jurors could only have understood that the Milwaukee robbery was a charge they were obliged to consider and from which they could, without limitation, infer

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* Although there is controversy over the ingredients of a single conspiracy and the degree of prejudice therefrom for reversal, United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975), United States v. Miley, 513 F.2d 1191 (2d Cir. 1974), United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974), this Court repeatedly holds that the issue is for the jury, not the district court, under proper instructions with respect to the multiple conspiracy issue. E.g. United States v. Finkelstein, 526 F.2d 517 (2d Cir. 1975), United States v. Torres, 519 F.2d 723 (2d Cir. 1975). The court below did not treat the multiple conspiracy issue properly, with prejudice to Williams. There should be a reversal on this ground. See the Brief for co-appellant McCray.

defendants' guilt. The indictment specifically setting it forth was read to them as they were empanelled (22), the Assistant stated on opening that Milwaukee was one of the charges (22-23) and dwelt on it again at great length in the same context on summation (939-963), and the vast bulk of the trial evidence concerned that robbery. At no time were the jurors told that their consideration of that evidence was subject to important limitations.* Only at the trial's conclusion, in a single cryptic paragraph, did the court mention similar act, but in language that urged the jurors to consider the Milwaukee proof first as an overt act (without limitation), and only secondarily as a similar occurrence (A75-76). Clearly this was not enough. United States v. Papadakis, supra; United States v. Cooper, supra.

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* Defense counsel brought these points to the court's attention during King's testimony (A83-84).

POINT II

THE DISTRICT COURT ERRED IN IMPLYING IN ITS CHARGE THAT THE REASONABLE DOUBT STANDARD DID NOT APPLY TO KING'S TESTIMONY.

Devitt & Blackmar, Federal Jury Practice and Instructions, Sec. 17.06(3d Ed.) prescribe a charge that the jury ought not convict on the uncorroborated testimony of an accomplice unless it believes that testimony beyond a reasonable doubt. The district court gave that charge (A70-71). The obvious implication is that there can be a conviction on less than a reasonable doubt belief in the accomplice as long as there is corroboration.

The Government produced purported corroboration. That indeed is what the case was about. Thus, on the most crucial issue presented -- assessing the accomplice -- the jury was misinstructed and misled on the degree to which it had to accept him to convict. This was error. Cool v. United States, 409 U.S. 100 (1972); United States v. Stulga, 531 F.2d 1377 (6th Cir. 1976).*

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* Cool and Stulga are not precisely in point because the accomplice testimony in those cases helped defendants. They demonstrate, however, that there is a negative implication in the charge we are considering which requires reversal.

This, by the way, is not the first time Devitt & Blackmar have led the district courts into error. See United States v. Tsanas, 2d Cir., January 13, 1978 (lesser offense charge).

POINT III

THE DISTRICT COURT ERRED IN DENYING THE RULE 17(b) APPLICATION AND IN CONVEYING ITS VIEW THAT SCOTT WAS NOT TO BE BELIEVED.

Two items, small in themselves, comprise this point. Possibly not grounds for reversal themselves, when combined with the aspects of Points I and II, they assume meaningful dimensions.

A. Disregard of this Circuit's Durant Opinion

While the Government was still on its case McCray requested that the Government pay to bring Frank Tillman Lewis from a Midwest federal prison to testify about statements King made to him at the MCC (677-78). Counsel stated that Lewis was "necessary and indispensable" to the defense and would offer valuable testimony attacking King's credibility (721).* The court twice denied the application, first on the ground that McCray had retained rather than C.J.A. counsel (677-78), the second time in addition (719-23) because it could not see the use of the testimony, especially when it heard that Lewis was in custody for bank robbery (723). It noted that King had been extensively cross-examined, that his prior record was before the jury, and that "as far as his credibility goes, I don't know if -- what more could be given to the jury?" (720)

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* The district court took this statement in open court. Counsel would have been at liberty to make a fuller presentation if the proceeding had been ex parte, as Rule 17(b) contemplates.

Lewis should have been produced. First, if the application were otherwise proper, F.R.Crim.P. 17(b) obligated the court to pay the expenses even if counsel was retained. McCray's counsel, in fact, came through the Community Law Offices, served without fee, and was prepared to file an indigency affidavit from McCray (677-78). The district court therefore was clearly wrong when it said that because counsel was retained, "I am not going to have the Government do anything" (677).

Second, interjection of the trial judge's views on the ultimate merits of the Lewis testimony directly opposed this Court's direction in United States v. Durant, 545 F.2d 823 (2d Cir. 1976) that the trial court not substitute its judgment for that of defense counsel and not "emasculate [Rule 17(b)] by niggardly or inappropriate construction." Cross-examination of King, no matter how extensive, could not substitute for an affirmative defendants' presentation that he lied. And while the district court might suspect that Lewis was untrustworthy because he was a bank robber, Lewis' credibility was for the jury to determine, not him. United States v. Durant, supra.*

* The issue in Durant arose under 18 U.S.C. 3006(A) because counsel was assigned. The question here comes under F.R.Crim.P. 17(b). The pertinent language of the two provisions is the same, "necessary to an adequate defense", so that Durant controls this case.

It is of no moment that the application as to Lewis came from McCray not Williams. The two defendants presented a common defense, the Lewis application bore on that defense, and failure to produce him hurt Williams equally with McCray. It is doubtful, moreover, that Williams had any greater ability to pay for the Lewis trip than McCray.

B. Discrediting Scott

The district court not only kept defendants from presenting the case they wanted, it helped discredit the one they did. Scott may not have been the greatest witness in the world, but he was all defendants had, and he was good enough to have the jury call for his complete testimony during deliberations. It is of some moment therefore that the court, which up to then had played almost no role in questioning witnesses, interjected with eight pages and more of cross-examination (893-97, 907-09), evincing a total lack of belief in Scott's story, questioning the good faith of his purported conversion to Allah (which led him to give the testimony), and drawing Williams into the whole thing by inquiring of Scott whether Williams also was a Muslim (896-97).* The jury could only take from this the court's obvious belief that Scott was not to be credited. This too was improper. United States v. D'Anna, 450 F.2d 1201 (2d Cir. 1971); United States v. Grunberger, 431 F.2d 1062, 1067-68 (2d Cir. 1970); United States v. Nazzaro, 472 F.2d 302 (2d Cir. 1973).

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* The court did not sit on Fridays because of Williams' religion. The jury knew this.

POINT IV

THE DISTRICT COURT COMMITTED OTHER ERRORS WHICH PREJUDICED WILLIAMS AND REQUIRE A NEW TRIAL.

Other aspects of the trial deserve comment.

(1) Two witnesses who testified on the Milwaukee phase of the case identified Williams in court. One was the police officer who arrested him on the drunk driving charge, the other the Georgia car dealer from whom Williams bought a Lincoln on March 12. During the investigation they were shown photographs (448-49, 763-64). However, by the trial the pictures were not available to ascertain whether they were unduly suggestive (451-52, 771-74).

Since the photo identification preceded Williams' arrest, there is no right to counsel issue. United States v. Wade, 388 U.S. 218 (1967); United States v. Ash, 413 U.S. 300 (1973). United States v. Tolliver, 2d Cir., January 3, 1978, however, indicates, at least to us, that Brady v. Maryland, 373 U.S. 83 (1963) compels the Government to preserve the photos and the method of identification, to be made available later on to defense counsel. This did not occur so that the identification should not have been allowed.

(2) The district court charged both the 2113(d) and the 2113(a) offenses, and had the jury return verdicts on both. Typically, however, the court allows the jury to move to the 2113(a) lesser offense only if it acquits on the section (d) offense.

See, e.g., such a charge given by Judge Mishler in the Bell case; charge in United States v. DiGiovanni, 76-1097, 2d Cir. The court's contrary charge here was confusing and misleading and improperly gave the Government convictions both under section (a) and section (d) when defendant could be sentenced only on one. Prince v. United States, 352 U.S. 322 (1957); United States v. Pravato, 505 F.2d 703 (2d Cir. 1974).*

(3) On cross-examination defense counsel examined King on inconsistencies between his trial testimony and prior statements to the FBI. The trial court then compelled counsel to introduce the reports into evidence (190) and admitted into evidence on Government rebuttal two other written reports as prior consistent statements (426), citing F.R.Evid. 801, 106.

This admission, however, of these unedited, unredacted, prejudicial FBI reports of statements (which of course were hearsay) following an unwarranted requirement that the defense put into evidence the Brady material it used, was wrong. F.R.Evid. 403, 801.

(4) Finally, we submit that the gap in the sentences between Williams and McCray, on the one hand (forty-five and forty) and Bell, Hairston and Graham on the other (fifteen, five and probation) represents unwarranted disparity calling

* The charge in the transcript, now part of our Appendix, has citations (e.g. A 71, 76, 79), parentheses (A 63, 72-73) and headings. Apparently it is not the charge the court read to the jury but was taken from a written copy.

for vacation of the sentences. United States v. Wiley, 278 F.2d 500, 503 (7th Cir. 1960); Rubin, From Disparity and Equality of Sentences -- A Constitutional Challenge, 40 F.R.D. 55.

CONCLUSION

In other Circuits the Milwaukee robbery would have been excluded altogether. E.g., United States v. Myers, 550 F.2d 1036 (5th Cir. 1977). If it is to come in, the least we can ask is that the Federal Rules of Evidence limitations be observed. Because they were not and because of the other errors discussed above,* Williams' conviction should be reversed and the case remanded for a new trial.

Respectfully submitted,

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(on the Brief)

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* We rely in addition on points raised by co-appellant McCray to the extent applicable. Although appeal counsel ordered the Williams sentencing minutes, those had not been received by this Brief's filing date. Rather than request an extension for something which may prove academic, we are filing this Brief and will request leave to file a Supplemental Brief if the sentencing minutes warrant it.

CERTIFICATE OF SERVICE

I certify that on February 10, 1978, I delivered one copy of the Brief for Appellant Charles Williams to David Trager, Esq. 225 Cadman Plaza East, Brooklyn, N.Y., 11201.

Donald E. Nawi